(1) No. 96 665 OCT 28 1996

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

ENERGY TRANSPORTATION CORPORATION,

Petitioner,

—v.—

JIMMIE GARNER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In a case involving defense of false swearing which the judge says the jury doesn't believe and which he predicts will result in "enhancing the damages that you are going to pay", is the verdict loser denied a fair trial in the event: (a) after its summation insisting upon the importance of truth telling and explaining why an injury for which damages are thereafter awarded might not have occurred, the judge tells the jury, based upon his "experience" that "lying . . . usually that doesn't happen" because although he or she may "misremember" facts "usually the witness has convinced him or herself [of] what he or she is saying by the time they get on the witness stand"; (b) after the prevailing party claims that an affidavit given "under oath" to his attorney prior to trial is not "truthful" because it impeaches his testimony "in certain material respects" the judge says to the jury that truthful was "a word he didn't understand"; and (c) the judge adds to and distorts the evidence by asking questions designed to have that party withdraw his admission of false swearing and substitute a claim that his affidavit was merely mistaken, with (d) the result that not only this prior inconsistent statement but all such statements are denied impeaching effect?

2. If a motion for a new trial on evidentiary grounds is denied without weighing evidence by a judge who "think[s] the facts are completely different from what [the verdict winner] testified to" but is unable to consider whether testimony essential to the verdict is false because "every human being who has ever lived keeps on reconsidering things and changing their views of what happen[ed]" and therefore misdescription of fact is "not perjury"; and, as a matter of court of appeals law, cannot weigh evidence because not permitted to disagree with any evaluation of witness credibility made by the jury; and as a result its findings of fact are not re-examined although this is a common law protection guaranteed by Rule 59(a) F.R.Civ.P., is the moving party denied U.S. Const. *Amend.* V Due Process of Law?

PARTIES TO THE PROCEEDING BELOW AND RULE 29 DISCLOSURE

All parties to the proceedings below appear in the caption of this case and, pursuant to Rule 14.1(b) of the Rules of the Supreme Court of the United States, need not be separately listed.

Pursuant to Rule 29.6, the following corporations are corporate parents, subsidiaries or affiliates of petitioner Energy Transportation Corporation:

Energy Transportation Group, Inc.
Energy Ammonia Transport, Inc.
Patriot II Shipping Corporation
Patriot III Shipping Corporation
Patriot IV Shipping Corporation
Burmah Gas Transport, Inc.
General Dynamics Corporation
Wilmington Trust Co.
Hull Fifty Corporation
United States Trust Co.
Summit I, Inc.
Summit II, Inc.
Summit III, Inc.
Energy Cherokee I, Inc.
Energy Cherokee II, Inc.
Energy Cherokee III, Inc.
Energy Cherokee IV, Inc.
Energy Cherokee V, Inc.
Bethel Marine, Inc.
Southhold Marine, Inc.
Vermont Marine, Inc.
Apache Marine, Inc.
Blackfoot Marine, Inc.
Navaho Marine, Inc.
Comanche Marine, Inc.
Mohican Marine, Inc.

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OPINIONS BELOW

The order of the Court of Appeals for the Second Circuit denying petitioner's petition for rehearing is reprinted in the Appendix to this petition at 16a. The summary order of the Court of Appeals for the Second Circuit affirming the judgment of the district court is reprinted at 1a-4a. The order of the United States district Court for the Southern District of New York denying petitioner's motion for a new trial pursuant to Rule 59(a) F.R.Civ.P. appears at 5a. The record of oral argument of this motion is reprinted at 6a-13a.

BASIS OF JURISDICTION

This is a seaman's case brought pursuant to the Jones Act, 46 U.S.C. § 688 and General Maritime Law which was tried to verdict March 24, 1995 adverse to petitioner in the United States District Court, Southern District of New York, that court having jurisdiction pursuant to 28 U.S.C. §§ 1331, 1332 and 1333. Judgment was entered April 18, 1995 and on May 5, 1995 petitioner moved pursuant to Rule 59(a) F.R.Civ.P. for a new trial for reason of error by the judge in testifying although he was presiding; and because the verdict was against the weight of evidence and based upon testimony which was false. On September 8, 1995 the motion was denied "for the reasons stated on the record" at oral argument the same day. On September 25, 1995 petitioner appealed to the United States Court of Appeals for the Second Circuit where it renewed its claim of error during trial and also sought to have the court of appeals order a new trial because the judge did not consider the issue of false testimony or otherwise weigh the evidence. On June 25, 1996, the district court's denial of petitioner's motion was in all respects affirmed by summary order. On July 9, 1996, petitioner sought rehearing which was denied by August 27, 1996 order without opinion. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1)

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. CONST. AMEND. V:

No person shall be . . . deprived of . . . property, without due process of law;

U.S. CONST. VII:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Rule 59(a) F.R.Civ.P.:

A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United states.

Rule 605 F.R.Evid.:

The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.

STATEMENT OF THE CASE

During the trial of this case the following occurred: (1) respondent (hereinafter "plaintiff") "totally disagreed with" (A.569)[1] his October 14, 1992 affidavit (18a-19a) which he admitted he had known was a statement given "under oath" (A.631) to his attorney when suit was begun. He did so because, as he conceded, it differed from his testimony at trial "in certain material respects" (A.636); and he thereupon "admitted" that the affidavit's contents were both not "accurate" and not "truthful" (20a); (2) after plaintiff responded "No sir" to petitioner's question whether his affidavit had been "truthful" the court asked: "What do you mean by 'no sir' " followed by: "It was mistaken" and next: "So you did not realize what truthful meant"; (3) when plaintiff answered the last question not by agreeing but by saying "I am confused about that" the court ruled: "That's the end. No more discussion" and moments later, although plaintiff never so testified, told the jury: "It was a word [truthful] he didn't understand" (20a-21a); (4) out of the jury's hearing soon thereafter, the judge, although acknowledging "I think the facts are entirely different from what [plaintiff] testified to", asserted that petitioner was "wrong" to "accuse [ ] [plaintiff] of perjury" by prefacing cross-examination questions with "you allege, you claim" because witness misdescription of fact "is not perjury" since "every human being who ever lived

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[1] The relevant portions of this affidavit and other impeaching documents, as well as plaintiff's testimony and the trial judge's remarks and questions both to the jury and out of its hearing are reprinted in an appendix to this brief and references to them are followed by "a". References preceded by "A" are to the Joint Appendix in the Second Circuit Court of Appeals. What is at issue includes the court of appeals' denial of a district court's power to grant a new trial upon finding testimony the jury believed to be perjury, unworthy of belief, or implausible. Description of some of the trial testimony and other evidence is necessary to show that the verdict was, in fact, based all but exclusively upon plaintiff's contradicted and self-impeached, and at least implausible, testimony.

keeps on reconsidering things and changing their views of what happen[ed]", following which the judge predicted that petitioner's claim that plaintiff's testimony was perjury would result in "enhancing the damages that you are going to pay" (23a); (5) after petitioner had argued in summation that plaintiff's knee injury for which damages are thereafter awarded might not have happened (A.1358) and that the jury "must insist on truth telling" because ". . . telling the truth . . . is the only thing that makes this system work" (A.1392), the judge told the jury that he didn't "like" the word "credibility" because in his "experience" "lying . . . usually, that doesn't happen" and, instead, "usually the witness has convinced him or herself [of] what he or she is saying by the time they get on the witness stand" although they may "misremember" facts (24a-25a), thereby assuring that it would not accept petitioner's claim of plaintiff's perjury.

Plaintiff sought damages as a result of two unwitnessed shipboard "slip-and-fall incidents" the first of which was said to have resulted in injury to his left knee on January 17, 1991. The second occurred on March 13, 1991 as a consequence of which he suffered a fractured elbow. Trial resulted in a jury verdict for $1,100,000, of which $672,000 was awarded for pain and suffering, $128,000 for past lost wages attributed to knee injury alone and $60,000 per year for five years future pecuniary loss which also included nothing for economic consequences of elbow injury. Because plaintiff made liability claims not mentioned when his accidents were reported and only his testimony connected his alleged January 17, 1991 injury and need for knee replacement surgery more than 2 1/2 years later, the condition of his knee upon joining petitioner's vessel, together with the causes of both his shipboard accidents and whether the first even occurred, and if it did what had been its effect, were the questions to which the trial was devoted. Although plaintiff claimed that his fall on January 17, 1991 had been so traumatic that he thought his "leg broke off" (A.518), his wage records showed that he worked 314.5

hours overtime thereafter, including four hours on January 17, 1991, until his elbow fracture less than two months later. What he alleged had caused both incidents was impeached by his signed Injury Report statements—he substituted for the naturally occurring conditions reported aboard ship (wind for the first (26a) and "heavy dew . . . and salt on the deck from washing down" for the second (A.1563)), claims contradicted by petitioner's witnesses and supported only by his testimony that the chief mate and master had admitted liability for grease or oil on deck caused by leaking winches as well as alleged absence of "non-skid" paint (see, e.g., A.184, A.382-3, A.386 and A.395). What was most badly impeached by his prior inconsistent statements was plaintiff's claim dependent upon his description of symptoms alone of connection between injury to his knee aboard ship and need for disabling surgery, a fact establishing that in this case the evidence cannot be weighed without considering the question of false swearing.

The jury found causal connection between plaintiff's shipboard knee injury and knee replacement surgery performed on October 5, 1993 although he had an arthritic left knee no later than January 16, 1989 which he admitted he had "twisted" (A.342-3) in late December 1990 as a result of a fall off a porch at his mother's home after he had been physically examined by his union and before flying out on January 2, 1991 without being re-examined to join petitioner's vessel in Japan. The surgeon who treated him beginning March 19, 1991 and performed knee replacement surgery testified as plaintiff's only medical witness. He said it would be "difficult" and "complicated" to attribute need for that surgery—which the doctor testified would have been inevitable within "five or ten years" (A.992) solely due to arthritis existing in 1989 and which, because plaintiff was a seaman, would be disabling when performed—to his January 17, 1991 alleged injury aboard ship in the event his knee injury at home had been the cause of "symptoms . . . [which] . . . were ongoing" (A.1107). On March 29, 1991 his surgeon referred plain-

tiff to a physiotherapist who obtained a history, not of an injury occurring aboard ship in January 1991, but: "Pt [patient] . . . states that he twisted his leg back on December of 1990, continued to have problems with it . . ." (29a). Plaintiff testified to the contrary, that his fall at home—which he characterized as "such an incidental accident . . . it was not recognizable to this day" (A.499) because causing no pain when it occurred and resulting only in "a slight swollen knee" the next day (A.503)—had been the source of no symptoms as of January 8, 1991 (A.355), a fact which his doctor, in testifying to causal connection, assumed (A.983-4). Plaintiff's testimony regarding the effect of his injury before joining was contradicted by the vessel's master who testified that when plaintiff signed articles January 4, 1991 his left knee swelling was visible through his pants (A.1200) and that plaintiff successfully "pleaded" with him not to be sent ashore for examination in Japan because if he had been found not fit the result would be "financially a disaster" (A.1200-1). The chief mate testified that upon his examination on January 6, 1991 and thereafter before plaintiff's January 17, 1991 shipboard fall, plaintiff's left knee was "very badly swollen" (A.160-1, A.170-1) and was in such "terrible shape" (A.196) as to cause the mate, upon his examination two days before symptoms from injury before joining allegedly disappeared, to put plaintiff on "light duties" and advise him to "stay off knee as much as possible" (28a), despite which he refused to see a doctor upon the vessel's arrival on January 13, 1991 at a port in Indonesia (A.160-1).

Plaintiff's claim of insignificant injury at home causing no symptoms more than a week before his January 17, 1991 knee injury was impeached by the report of injury prepared aboard ship (26a-27a), the entry in the ship's medical log (28a) describing the condition of his knee before that injury and his affidavit (18a-19a). In the report of his first injury plaintiff admitted he had "sprained" his knee in his fall off the porch and that this injury had been "aggravated" when he "fell down

on the deck again twisting . . . [his] . . . leg" (26a-27a). At trial plaintiff claimed that he had signed this report when it was blank (A.376-9) just as he said essentially the same thing about the ship's accident report prepared after his elbow injury (A.412-3) which his testimony also contradicted. Why he would have signed the ship's medical log although doing so acknowledged as he knew (A.1577) that his knee was "sprained" and "swollen" on January 6, 1991 was also explained—plaintiff testified that he had done so on January 22, 1991 believing it was a "consolidated" entry reflecting his mere request to the mate for Ibuprophen tablets which had been left on his desk on January 6, 1991 and examination and treatment only after his January 17, 1991 alleged fall (A.397). Plaintiff's testimony was even more emphatically impeached by the affidavit given to his attorney which was prepared after he had obtained his "complete file" concerning both accidents (21a-22a). In this affidavit plaintiff stated: "On 1/6/91, I mentioned to the chief mate that I had injured my knee at home and . . . [it] . . . was swollen" although, because offering support for his claims that the accident report was blank when he signed it and contrary to what was stated in the medical log that his knee had not been examined aboard ship before January 17, 1991, denying that he had (A.628-30). Although in his affidavit plaintiff also admitted that he had been given an Ace bandage for his swollen knee on January 6, 1991, he claimed at trial that on that date it only "might have still [had] some slight swelling" (A.355) and that he had been given one for the first time only after January 17, 1991 (A.374-5); and in it plaintiff asserted, because of the condition of his knee four days *before* the occurrence of his alleged knee injury aboard ship, that his "employer was negligent . . . in allowing me to stay on the ship after 1/13/91". In his complaint, "Count" I, para. 4 and "Count" IV, para. 2, plaintiff alleged "aggravation of a previous injury" and claimed that "damages resulted from defendant's failure to provide adequate medical assistance" thereby adopting his injury report "aggravation" admission and the description of the

condition of his knee on January 6, 1991 contained in the medical log. Nevertheless, he testified that when the chief mate inexplicably asked him on January 13, 1991 when the vessel reached Indonesia whether he wanted to go to a doctor ashore for examination he "pulled up . . . [his] . . . britches" and the mate remarked that his knee "looks okay to me" (A.360), thus establishing that the claim by affidavit that petitioner had been "negligent . . . in allowing me to stay on the ship after 1/13/91" as well as plaintiff's never amended complaint allegations cannot be reconciled with his testimony which the jury accepted. In fact, his testimony disagreed even with his doctor's records and testimony. In order to avoid claim of failure to follow medical advice plaintiff testified that the fracture fragment in his elbow displaced during physiotherapy (A.446-7) "along summer, the latter part of it" when his doctor "recommended that I needed to have a pin put in there" in response to which he allegedly said ". . . look, I'm getting ready to go back to sea, I've got to go back to work" (20a). To the contrary, some slippage occurred no later than March 29, 1991 and plaintiff refused to have internal fixation at that time (29a, 30a), 4 1/2 months before he returned to sea on August 10, 1991 (A.447). Why his testimony was believed is apparent from the fact that the court explained how plaintiff's contradictory affidavit did not impeach his testimony by establishing that it was only "mistaken"; and that the shipboard records he signed were also without impeaching effect because each had been explained by his testimony which the judge, by pledging his "experience", told the jury not to believe was false.

Petitioner's Rule 59(a) F.R.Civ.P. motion was based upon violation of *Quercia v. United States*, 289 U.S. 466 (1933) because the trial judge testified; and on evidentiary grounds because plaintiff's testimony was incredible and, hence, without weight. During oral argument, the judge ignored the fact that he had told the jury that "[i]t was a word [truthful]" [plaintiff] "didn't understand" and ruled, with respect to his

"comments" just prior to his instructing the jury: "I put that in every charge I have given since I have been on the bench and so far I haven't been reversed . . . and I don't think it (sic) will be this time" (7a). With respect to weight of evidence, the court stated: "Don't argue that point" (7a) and by order the same day denied petitioner's motion "for the reasons stated on the record" (5a) during oral argument without having given any reason other than confidence that he would not be reversed. Upon appeal, petitioner again argued that the judge had testified and that this error violating Rule 605 F.R.Evid. as well as *Quercia*, *supra*, required a new trial on all issues. Because the trial judge had "resolutely failed" to consider the "law on the weight of evidence" (Brief, 1/24/96, pps. 43-44) although during trial he had observed that the facts were "entirely different from what . . . [plaintiff] . . . testified to" and had admitted that he could not consider fairly the issue of witness perjury, petitioner also questioned "whatever may be the rule in an ordinary case regarding court of appeals' review of a grant or denial of motion for a new trial" whether the court of appeals had to "review the weight and, hence, credibility of evidence" since "for the . . . [Second Circuit] . . . not to would deprive defendant of the protection of Rule 59 F.R.Civ.P. if not its U.S. Const. *Amend.* VII right to trial by jury, including the right to have facts tried to a jury re-examined . . . 'according to the rules of the common law' " (Brief, 1/24/96, Questions Presented No. 5). It asserted that the trial judge's power to grant a new trial based upon the evidence ". . . acts as a deterrent to interested party tendency '. . . to keep[ ] on reconsidering things and changing their views of what happens' in order to falsely put the case in a more favorable light". Petitioner argued that a trial judge in considering a motion for a new trial addressed to the evidence ". . . must independently assess the credibility of witnesses" and must "set aside a verdict . . . when in his opinion it is contrary to the clear weight of evidence, or is based upon evidence which is false". It argued further because of the trial judge's failure to assess weight of evidence and his inability

to consider witness credibility: "Rule 59 F.R.Civ.P. requires this Court to itself consider the weight and credibility of evidence and grant a new trial" (*Ibid.*, pps. 44-46).

The court of appeals affirmed after noting that "defendant primarily argues that a new trial is required on the ground that the district judge 'testified' in connection with the defendant's cross-examination of the plaintiff and during the court's charge addressing witness credibility". By holding: "Although this trial may not have been error free, the defendant is entitled only to a fair trial, not a perfect trial" as well as "[I]t is well established that a judge may ask questions of a witness that may aid the understanding of the jury", the court of appeals rejected petitioner's claim of error resulting from the district court's testifying because the trial judge "did not step across the line and become an advocate for one side" with the result that "the judge's comments, while less than desirable, did not compromise the fairness of the trial to defendant". It did not discuss petitioner's appeal from the district court's denial of its motion for a new trial on evidentiary grounds, and upon finding that the amount of the verdict did not shock its conscience, held every other issue petitioner raised to be "without merit". In seeking rehearing petitioner argued that affirming a denial of a new trial without the trial judge or the court of appeals having considered weight or credibility of evidence represented abrogation of a traditional common law protection which, by virtue of *Honda Motor Co. v. Oberg*, 512 U.S. ___, 114 S.Ct. ___, 129 L.Ed.2d 336 (1994), constituted a U.S. Const. *Amend.* V Due Process violation. It also argued that the court of appeals, to avoid such a result, had itself to grant a new trial; or if it should determine that he was capable of assessing credibility despite his belief in what witnesses usually do, remand to the trial judge for reconsideration of petitioner's motion under the standard established by cases approved in *Gasparini v. The Center for the Humanities*, U.S. Sup. Ct. No. 95-719 (June 24, 1996); 1996 U.S. LEXIS 4051; 64 LW 4607, (Pet. for Reh., pp.15).

It also asserted that ". . . the district court responded when perjury was established by denying that it had or could happen, with the result of taking steps to assure that it would succeed" and that "[m]ost unfortunately . . . [the court of appeals'] . . . reaction so far has been identical" (Pet. for Reh., pp.14). In denying its petition for rehearing, the Second Circuit refused to consider whether its affirmance, which excused not only the trial judge's testifying but also his inability to find any witness' testimony to be false and his refusal otherwise to consider weight, would have the effect of encouraging false swearing. The reason would appear to be that the court of appeals' view of what constitutes "weight" of evidence and "abuse" of discretion in granting a new trial motion addressed to the evidence, however unintentionally, achieves the same result.

ARGUMENT

A. Introduction

In the Second Circuit, new trial grants are subjected to appellate review the effect of which is to bar rejection of verdicts finding liability or awarding damages for disputed injuries through substitution of the Rule 50(b) F.R.Civ.P. standard of legal sufficiency for Rule 59(a) F.R.Civ.P. weight of evidence in both the district court and court of appeals. Why it and all other courts of appeals in defiance of this Court's precedent should have created their power to review; and the Second Circuit and some others rendered district courts defenseless in the face of perjury, is not easily accounted for. Since when a Rule 59(a) F.R.Civ.P. motion is granted because based upon false testimony reversal in that and other circuits is today certain, the Second Circuit's rule means that jury determinations of fact where weight of evidence cannot be distinguished from truthfulness of testimony, on any issue other than excessiveness or inadequacy of damages, are final. Such a result in civil cases is so extreme as to seem more than

the product of a mistake of analysis and, if this is so, can be thought to be the result only of inappropriate confidence in witness honesty or misplaced concern for "judicial economy". What is assured in light of the courts of appeals' view of their power and the limits imposed as a result of its exercise is that it would indeed be better if, in fact, "lying . . . usually that doesn't happen". It is, therefore, reasonable to conclude that excusing the trial judge's error testifying was necessary because what he told the jury is what the Second Circuit also assumes—it, too, may believe that since reconfigured recollection is "not perjury" every verdict can be assumed to be ethically neutral. Surely, the trial judge's credulity should be shared if that court believes that judicial conscience should not be shocked by jury acceptance of testimony believed to be perjury; or if, as its decisions in effect hold, no verdict based upon sufficient evidence other than one which is excessive or inadequate can be called a miscarriage because justice is whatever the jury finds the facts to be. Every error in this case may, alternatively, have arisen from belief by the trial judge and the court of appeals that whether testimony, in a simple but "highly disputed" case such as this one, is merely reconfigured recollection or is perjury is not important because in neither instance can either do anything about it. A rule making a new trial grant an abuse of discretion if the trial judge rejects a verdict because of disagreement with the jury's evaluation of credibility means that testimony no matter how badly self-impeached has the same "weight" as evidence which is not impeached at all; and this might explain why the court of appeals refused to itself grant a new trial based upon the evidence or to remand for consideration under the correct standard requiring the trial judge to independently assess the truthfulness of the testimony the jury believed. If in the Second Circuit *no* judge can consider credibility of witnesses on a new trial motion addressed to the evidence, whether a particular judge is unable to find testimony not to be truthful for reason of personal belief is of no significance, of course. Denying a district court this power would, moreover, be a

direction from the Second Circuit not to consider whether testimony the jury heard was false, which is the same thing the trial judge told the jury; and the former would have the identical apparently unforeseen potential of encouraging false swearing as the latter. Thus, whether or not resulting from shared belief as to what witnesses usually do, excusing the district court's "comments" is related to the court of appeals' view of weight of evidence and what constitutes abuse of a trial judge's discretion; and both, no doubt, reflect the hostility of the Second Circuit to retrials whatever the grounds.

There is, therefore, a third issue which this petition raises—whether the judge's belief informs or reflects the Second Circuit's view of what constitutes testimonial weight and, with that, abuse of discretion in deciding a motion pursuant to Rule 59(a) F.R.Civ.P., for if it does, it cannot be expected that he would be reversed for telling the jury either the actual basis of a rule of court of appeals' creation or something, for reason of that rule's impact, which it should believe. That it may is shown by the fact that this Court has "emphasized the duty of the trial judge to use great care that an expression of an opinion upon the evidence should be so given as not to mislead, and especially that it should not be one-sided; that deductions and theories not warranted by the evidence should be studiously avoided . . . [and that a trial judge] . . . may not charge the jury upon a supposed or conjectural state of facts, of which no evidence has been offered". *Quercia v. United States*, *supra*, 289 U.S. at 470. Thus, the trial judge's "comment" regarding what witnesses "usually" do in his "experience" had to be found by the court of appeals to be error because it surely is both a "theor[y] not warranted by the evidence" and a "conjectural state of facts" for which there can be no competent proof. Because the court of appeals did not so find and no trial judge in the Second Circuit no matter how convinced of interested witness perjury can reject a jury's verdict by disagreeing with its evaluation of credibility; and, hence, cannot in any case where weight of evi-

dence is not independent of witness truthfulness grant a new trial, why affirmance without the facts being re-examined violated Rule 59(a) F.R.Civ.P. and, hence, represents a denial of Due Process—although an issue this Court might not reach—will be described first.

B. The Judgment Could Not Be Properly Affirmed Even Had There Been No Error During Trial

It has always been law that the courts of appeals cannot re-examine facts found by a jury and as a result determinations of new trial motions addressed to weight of evidence on any issue other than excessiveness or inadequacy are not reviewable. *Parsons v. Bedford*, 3 Pet. 433, 447-9 (1830); *Fairmont Glass Works v. Cub Fork Coal Co.*, 287 U.S. 474, 481-82 (1933); *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 254 (1940); *Portman v. American Home Prods., Inc.*, 201 F.2d 847, 848 (2nd Cir. 1953, L. Hand, J.). Because the Seventh Amendment adopted common law of England in respect of trial by jury as it existed in 1791 (*Dimick v. Schiedt*, 293 U.S. 474, 477-78 (1935)), it has also always been law, as was recently reaffirmed in *Gasparini*, *supra*, 64 LW at 4612, that a trial judge has the same "large" discretion pursuant to Rule 59(a) F.R.Civ.P. as English common law trial courts had to grant a new trial "with a view to the attainment of justice" which the U.S. Const. *Amend.* VII re-examination clause does not "inhibit" because not in derogation of the right to a trial by jury but, instead, its historic safeguard (*Aetna Cas. & Surety Co. v. Yeatts*, 122 F.2d 350, 353 (4th Cir. 1941)). As this Court also recently acknowledged, the trial judge has a *duty* to set aside a verdict "if it should clearly appear that the jury have committed gross error" (*Blunt v. Little*, 3F.Cas. 760, 761-62 (Case No. 1,578) (CC Mass. 1822)) or if "the verdict appears to [the judge] to be against the weight of the evidence" (*Byrd v. Blue Ridge Rural Elec. Cooperative, Inc.*, 356 U.S. 525, 540 (1958)). Not mentioned in *Gasparini* is the fact that because "weight" of evidence cannot except in unusual

cases be considered without reference to witness truthfulness, it has always been thought that the trial judge had to make an independent assessment of credibility and needn't consider the evidence in a light most favorable to the verdict winner. This view is reflected even in recent cases. See, e.g., *Bevenvino v. Saydjari*, 574 F.2d 676, 684 (2nd Cir. 1978) (in deciding a new trial motion the trial judge considers "character of the evidence"); *Ryan v. McDonough Power Equip*, 734 F.2d 385, 387 (8th Cir. 1984); *Gill v. Rollins Protective Services Co.*, 773 F.2d 592, 595 (4th Cir. 1985); *Payton v. Abbott Labs*, 780 F.2d 147, 152-53 (1st Cir. 1985); *Swentek v. USAIR, Inc.*, 830 F.2d 552, 559 (4th Cir. 1987); *White v. Pence*, 961 F.2d 776, 780 (8th Cir. 1992); *Thomas v. Stalter*, 20 F.3d 298, 304 (7th Cir. 1994). Moreover, because judgment n.o.v. involves issue of sufficiency of evidence and a motion for a new trial its weight, there is no doubt "[e]ach . . . has its own office". *Montgomery Ward & Co. v. Duncan*, *supra*, 311 U.S. at 251. There has also never been doubt until recently that a trial judge must "exercise unflinchingly" his or her power to set aside a jury's verdict if concluding that it was based upon testimony which is false. *Aetna Cas. & Surety Co. v. Yeatts*, *supra*, 122 F.2d at 353; *Dellaripa v. New York, New Haven & Hartford R. Co.*, 257 F.2d 733, 735 (2nd Cir. 1958) (when the result may be based on false swearing the trial judge cannot "hid[e] behind the jury's verdict").

All courts of appeals to some extent now disagree and some, including the Second Circuit, disagree totally. The error in affirming denial of petitioner's motion on evidentiary grounds arose from the view that it is necessary, although a new trial grant means trial by another jury, for the courts of appeals to intervene in order to prevent the "injustice" of depriving the prevailing party of his or her liability verdict because doing so "effects a denigration of the jury system" and as a consequence "close [appellate] scrutiny is required to protect the litigant's right to trial by jury". *Lind v. Schenley Industries, Inc.*, 278 F.2d 79, 87-90 (3rd Cir. 1960).

Although appellate review of new trial determinations for reason of the evidence was limited by *Fairmont Glass Works Co. v. Cub Fork Coal Co., supra*, 287 U.S. at 482-83 to instances where the motion was denied for mistake excluding evidence or concerning the extent of the trial judge's discretion or authority, granting a new trial was found in *Lind* to be an abuse of discretion because the verdict was based upon legally sufficient evidence and for that reason depended upon the jury's assessment of credibility with which, as the dissent established, the trial judge had reason to disagree (278 F.2d at 92). This view, which the *Lind* dissent also recognized as "impinging upon the function and discretion of the trial judge in a way that is serious, regrettable and without precedent in this court", appears to create a contradiction. Such a determination cannot be reviewed, presumably in part because reexamination of facts including credibility is a task only the trial judge who observed demeanor can effectively perform; but in doing so his or her discretion is abused whenever the verdict is rejected because of jury mistake of weight if it involves credibility. Obviously, if abuse is established upon showing as "special or unusual circumstances" (278 F.2d at 88) only that the judge disagreed with the jury's credibility assessment, *every* new trial grant is reviewable. *Lind* also approved error expressed in *Pelham v. Hendricks*, 132 F.Supp. 774, 775 (D.C. Pa. 1952) that in considering a motion for a new trial based upon claim that the verdict is against the weight of evidence "[t]he evidence and inferences . . . must be viewed in the light most favorable to the prevailing party . . ." (278 F.2d at 89), the standard employed on motion for judgment notwithstanding the verdict pursuant to Rule 50(b) F.R.Civ.P.

Some limitation of a trial judge's Rule 59(a) F.R.Civ.P. discretion in weight of evidence cases is, in fact, unavoidable if denials or grants of new trials can be reviewed by the courts of appeals at all; and it is abolished where issues of liability depend upon testimony if it is an abuse to disagree with the

jury's evaluation of credibility. The Second Circuit as well as other courts of appeals have all but stated they review not for weight but for sufficiency as if considering an appeal from an order pursuant to Rule 50(b) F.R.Civ.P. See, *Binder v. Long Island Lighting Co.*, 57 F.3d 193, 202 (2nd Cir. 1995) ("For the reasons [among others] stated . . . in our reversal of the instant grant of judgment n.o.v. . . . the verdict . . . was clearly not seriously erroneous"); *Dunlap-McCuller v. Reise Organization*, 980 F.2d 153, 157-158 (2nd Cir. 1992); *Hill v. Winn-Dixie Stores, Inc.*, 934 F.2d 1518, 1527 (11th Cir. 1991) ("our reasons for reversing the judgment notwithstanding the verdict . . . also support our conclusion that the jury verdict . . . was not contrary to the weight of evidence"); *Blake v. J.C. Penny Co., Inc.*, 894 F.2d 274, 281 (8th Cir. 1990) (conditional new trial grant reversed because based upon same grounds as erroneous grant of judgment n.o.v.) and the effect of its own statements causing confusion has been acknowledged by a court of appeals which later held that a motion for judgment despite the verdict and for a new trial are wholly separate. See, *White v. Pence*, 961 F.2d 776, 779, n.5 (8th Cir. 1992) ("We recognize that some of our cases . . . may give an impression that the same standards govern consideration of both motions for judgment notwithstanding the verdict and for a new trial"). Moreover, when a new trial is granted a "more exacting" or "more probing" review results and if granted because the verdict is against the weight of evidence a "still more rigorous" standard is applied (*National Services Industries, Inc. v. Hartford Acc. & Indem.*, 661 F.2d 458, 461 (5th Cir. 1981) (Unit B); *Matter of Innovative Const. Systems, Inc.*, 793 F.2d 875, 888 (7th Cir. 1986); *Latino v. Kaizer*, 58 F.3d 310, 314 (7th Cir. 1995)), thus demonstrating, not only as will be shown that credibility determinations are unnecessary to "rigorous" review but also, because what is the weight of the evidence is the same when the motion is granted or denied, that what the courts of appeals consider is other than weight. Similarly, many cases hold that before a trial judge can grant a new trial he or she must find that the verdict

is not just against the weight of evidence, i.e., outweighed by contrary evidence which is only more probative or believable, but against the "great" or "overwhelming" weight (see, e.g., *Firemans Fund Ins. Co. v. Aalco Wrecking Co.*, 466 F.2d 179, 187 (8th Cir. 1972) quoting *Cities Service Oil Co. v. Launey*, 403 F.2d 537, 540 (5th Cir. 1968); *Williams v. City of Valdosta*, 689 F.2d 964, 973 (11th Cir. 1982); *White v. Pence*, *supra*, 961 F.2d at 780), thereby showing that if the new trial standard is not sufficiency it is something approaching it. Despite cases stating that a trial judge has plenary power in re-examining facts found by a jury, it is what the courts of appeals hold constitutes abuse of discretion which establishes just how circumscribed the "weighing process" actually is.

The fact the trial judge did not consider either weight or credibility is established by Second Circuit law and not just by inference from his comments regarding what witnesses usually do and the fact that he refused to hear argument on petitioner's motion addressed to the evidence and failed to give any reason for its denial despite his observation: "I think the facts are entirely different from what . . . [plaintiff] . . . testified to". In the Second Circuit, the trial judge, who can re-examine facts found by a jury cannot while the court of appeals, which according to long-established law may not and admittedly is unable to do so effectively, can; but only when the motion is granted (*Binder v. Long Island Lighting Co.*, *supra*, 57 F.3d at 201) and not when it is denied (*Stonewall Ins. Co. v. Asbestos Claims Management*, 73 F.3d 1178, 1199 (2nd Cir. 1995)), a view of a court of appeals' power which encourages offer of testimony which is perjury. New trial grants are reviewed in cases where weighing requires determination of credibility which the Second Circuit has admitted it cannot decide. See, *Dunlop-McCuller v. Riese Organization*, *supra*, 980 F.2d at 158: ("Unlike the district court, we cannot make determinations concerning a witness' credibility"). See also, *Green v. American Airlines, Inc.*, 804 F.2d 453, 455 (8th Cir. 1986) (reviewing a denial of a new trial on

evidential grounds "would engage us in the weighing process that is properly within the province of the district court")). Because the standard upon appeal has to be the same as the trial judge applies (see, *Dunlap-McCuller v. Riese Organization, supra*, 980 F.2d at 161 (concurring op. Walker J.)), for the appellate courts to have the ability whether or not permitted by law to reverse a new trial grant the district courts must also be unable to consider credibility of evidence. It, therefore, has to be an abuse for a trial judge to reject a jury's evaluation of the truthfulness of any witness it heard; and if so, only sufficiency can be considered by the trial judge in determining a motion pursuant to Rule 59(a) F.R.Civ.P. directed to the evidence where its weight cannot be considered without reference to the credibility of the witnesses who offered it.

In the Second Circuit a trial judge in considering a motion for a new trial in such a case can search only for legally sufficient evidence: A grant of a new trial, if it requires rejection of any jury finding of credibility, *is* an abuse of discretion. *Sorlucco v. The City of New York*, 971 F.2d 864, 875 (2nd Cir. 1992), reversing a grant of a new trial on liability on grounds that the winner was guilty of perjury because the verdict depended upon "a matter of credibility for the jury to resolve", no ". . . contradictory evidence subsequently . . . [came] . . . to light revealing a perjury that would warrant a new trial" and jurors are "free to settle upon which witness[es] they believe[ ]". Other circuits agree: *Redd v. City of Phenix City*, 934 F.2d 1211, 1215 (11th Cir. 1991) ("[w]hen there is some support for a jury's verdict it is irrelevant what we or the district court would have concluded"); *Latino v. Kaizer, supra*, 58 F.3d at 313-317 (trial judge's disagreement with the jury's fact finding "implicated" *Amend.* VII and requires reversal for "clear abuse of discretion" whenever the case boils down to "a swearing contest" because "credibility of witnesses is peculiarly for the jury"; decision to grant a new trial based upon the trial judge's view of the "most rea-

sonable inferences from the evidence . . . flies in the face of the Seventh Amendment, and goes beyond the power of the district judge under Rule 59" in the event the testimony upon which the verdict was based was not "so physically impossible or contrary to the evidence as to provide a legitimate basis for in effect excluding it from the jury's consideration"); *Williamson v. Consolidated Rail Corp.*, 926 F.2d 1344-1352 (3rd Cir. 1991) (reversal of an order granting judgment n.o.v. "require[s]" consideration of a conditional new trial grant on evidentiary grounds although adoption of F.R.Civ.P. 50(c)(1) did not enlarge the scope of appellate review (see, *Akermanis v. Sea-Land Service, Inc.*, 688 F.2d 898, 904 (2nd Cir. 1982)); new trial discretion is of "limited nature by virtue of the Seventh Amendment"; court of appeals, itself unable to assess credibility adequately and owing "deference" to the trial judge's evaluation of weight of evidence, reviews in order to determine whether it "could have [been] reasonably concluded that miscarriage [of justice] would occur if verdict were left to stand"; miscarriage must appear "on the record" and therefore must be provable as opposed to believed even to the point of conviction; interested witness testimony of absence of symptoms prior to occurrence of what may have been either an aggravation or a re-injury means massive contrary medical evidence cannot be said to preponderate because when "the litigation is . . . within a layman's understanding"—as liability in injury cases and connection between injury and damages are—the trial judge "is given less freedom to scrutinize the jury's verdict"); *United States v. Kuzniar*, 881 F.2d 466, 470-71 (7th Cir. 1989) (In criminal cases "district courts may take testimony away from the jury" only when it is such "that reasonable men could not have believed it" and can grant a new trial because a verdict is against the "weight of evidence" only if the testimony supporting it is proven to be a physical impossibility since "a question as to the credibility of a witness . . . [is] . . . not sufficient grounds for granting a new trial").

Substituting the Rule 50(b) F.R.Civ.P. sufficiency standard for Rule 59(a) F.R.Civ.P. weight of evidence is, however, avoided in other circuits by a process which is more illusory than real. Some allow the trial judge to consider credibility of witnesses but then guide exercise of his or her discretion in a way which does not permit grant of a new trial in any case in where there has been a comprehensive dispute of fact. See, *Williams v. City of Valdosta*, *supra*, 689 F.2d 964 at 973, n.7, 976 ("Apparently, there is disagreement over whether the trial judge is permitted to make credibility choices when weighing all the evidence" and although holding he or she can: "In our view, the authorities suggest that the trial judge should not substitute his own credibility choices and inferences for the *reasonable* credibility choices and inferences made by the jury; "greater deference" owed a jury verdict when the trial involves "simple issues" and "highly disputed facts" but "trial courts have more freedom" to grant a new trial in cases involving "complex issues" and facts which are "not highly disputed"; to reject a jury verdict trial judge must find it "contrary to the great and not merely the greater, weight of evidence"; review for abuse "more stringent" or "stricter" when motion is granted and reversal required when court of appeals concludes that " 'there *is* no great weight of the evidence in any direction' "). See also, *Freeman v. Package Machinery Co.*, 865 F.2d 1331, 1333-34 (1st Cir. 1988) (new trial proper if based upon "clear" weight finding or that testimony was false but where weight is not "grotesquely lopsided, it is irrelevant that the judge . . . would likely have found otherwise").

Not every court of appeals agrees or goes as far. See, *Swentek v. USAIR, Inc.*, *supra*, 830 F.2d at 559 (proper to set a verdict aside in part based upon trial judge's own credibility determinations); *Moxness Products, Inc. v. Xomed, Inc.*, 891 F.2d 890, 893 (Fed.Cir. 1989) (judge must find verdict contrary to "great weight" of evidence but new trial grant affirmed although court of appeals not persuaded that stan-

dard had been met because district court assessed demeanor of a witness essential to the verdict and found "his testimony could not be reconciled with the documentary evidence"); *White v. Pence*, *supra*, 961, F.2d at 782 (trial judge able to reject a verdict by "great weight" standard but in weighing evidence may exclude testimony if found to be perjury, unworthy of belief or implausible). Remarkably, the Second Circuit claims that new trial denials are not reviewable because considering the entire trial record is not a task it should be required to perform (*Stonewall Ins. Co. v. Asbestos Claims Management*, *supra*, 73 F.3d at 1199) although this is a burden it volunteers to shoulder when the motion is granted; but not, of course, when based upon rejection of the jury's credibility finding because that fact alone requires reversal. More remarkably, although the Second Circuit holds that new trial denials based on weight are unreviewable and the Eighth Circuit has held that the Seventh Amendment bars appeal from a denial and observed that there had been, in any event, no case where a denial of a new trial on liability was ever reversed (*Green v. American Airlines, Inc.*, *supra*, 804 F.2d at 455), since adoption of rules barring trial judges from disagreeing with jury evaluation of credibility of evidence or limiting exercise of his or her discretion, a denial *has been* reversed (*Insurance Co. of No. America v. Valente*, 933 F.2d 921 (11th Cir. 1991)). This shows that the Eleventh Circuit's rule of "more exacting" scrutiny and its standard of "great" or "overwhelming" weight assures that new trials will not be ordered when they should by trial judges permitted to independently evaluate credibility, with the result either that an injustice must be accepted because such a ruling is unreviewable or unnecessary work for the courts of appeals. It appears that most courts of appeals discourage new trial grants by threatening reversal through exercise of the right to review and most seem united in the belief that it is better if a motion for a new trial addressed to the evidence is denied in error instead of mistakenly granted, despite the fact that if there were a presumption that a verdict is not mistaken it

"falls out of the case" when the judge finds that there is sufficient evidence justifying the contrary conclusion that it is. See, *DelVecchio v. Bowers*, 296 U.S. 280, 286 (1935); F.R.Evid. 301. Thus, in *Williams v. City of Valdosta*, *supra*, 689 F.2d at 974, n.8 it was said: "[W]hen the trial judge dismisses a jury verdict solely because in his view the evidence was [of] insufficient [weight], it is *more likely* that he has abused his discretion" although what the law presumes is not that a particular verdict is or is not mistaken but that jury verdicts in civil cases will be less often mistaken than judges' decisions; and ". . . the end that the truth may be ascertained and proceedings justly determined" (F.R.Evid. 102) is no less the aim in determining new trial motions than in admitting or excluding evidence. All this is said to be justified because forbidding or discouraging new trial grants is required in order to "protect a party's right to a jury trial" (*Dunlap-McCuller v. Riese Organization*, *supra*, 980 F.2d at 160, concurring op. Walker, J.); *Green v. American Airlines*, *supra*, 804 F.2d at 455, n.2; *Lind v. Schenley Industries, Inc.*, *supra*); or to "protect the role of the jury"; (*Hewlitt v. B.F. Goodrich Co.*, 732 F.2d 1554, 1556 (11th Cir. 1984); *Redd v. City of Phenix City*, *supra*, 934 F.2d at 1214-5); or in order to avoid ". . . destroy[ing] the role of the jury as the principal trier of facts" by "enabl[ing] the trial judge to disregard the jury's verdict at will" (*White v. Pence*, *supra*, 961 F.2d at 780)).

The first two are justifications which, in *Gasparini*, this Court, by approving *Aetna Cas. & Surety Co. v. Yeatts*, *supra*, held are wrong and the remaining question is whether all of the means employed and every justification offered resulting in "protection" from the trial judge's exercise of his or her Rule 59(a) F.R.Civ.P. duty—whose Seventh Amendment re-examination clause role is either abolished or diminished—are also mistaken. They apparently are. Excusing on *any* basis the trial judge's duty to grant a new trial when he or she is convinced the verdict is against the simple weight of evidence on a crucial issue and as a result is "gross error" was seem-

ingly recognized in *Gasparini* to be mistaken by approval of *Blunt v. Little*, *supra*. Thus, law of the Second Circuit holding that a trial court abuses its discretion if it disagrees for any reason other than newly discovered evidence with a jury's credibility assessment is not just error it represents a violation of U.S. Const. *Amend.* V Due Process of Law no different than found by this Court in its *Amend.* XIV decision, *Honda Motor Co. v. Oberg*, *supra*. Moreover, if re-examination "according to the rules of the common law" requires a new trial to be granted if only jury mistake of weight or credibility is "gross error" which "clearly appears" when the facts including credibility of witnesses are considered, so would the rule of any circuit which relies upon any presumption or policy to guide a trial judge's discretion.

C. Denial of The Motion for a New Trial Based Upon Error During Trial Was Error

This case makes clear that the Second Circuit's hostility to new trial grants extends to fair trial questions. In order to affirm, that court had to contradict Rule 605 F.R.Evid., *Quercia v. United States*, *supra*, and its correct reading of it but six months before. Especially since in the Second Circuit jury determinations of credibility are final, fundamental notions of fair play and essential justice would require it to hold a comment by a trial judge to a jury in a case where the facts are highly disputed, directed in any way to credibility on an important issue, be found error which is prejudicial unless it can be shown conclusively that it was not. Nevertheless, the court of appeals held that what the trial court said to the jury was neither a violation of Rule F.R.Evid. 605 nor of *Quercia*, *supra*, which, in the case which it cited but failed to follow, *United States v. Filani*, 74 F.3d 378, 384 (2nd Cir. January 11, 1996), it correctly read as holding: (1) a judge may not "assume the role of a witness"; (2) may "not add to or distort the evidence"; and (3) cannot "comment in a one-sided manner". In rejecting defendants' appeal it described the trial

judge's testimony as "comments" although it was he who told the jury that plaintiff did not understand what "truthful" meant and without benefit of what he said was his "experience" it would surely not have known that "lying . . . usually that doesn't happen". With respect to the alleged comments during cross-examination and a trial judge's right to ask "questions of witnesses that may aid the understanding of the jury", the court of appeals found no error although the judge certainly added to or distorted the evidence since each question he asked was intended to alter the clear testimony which plaintiff had just before given. When the plaintiff did not agree with the court's explanation of the excuse for his alleged false swearing prior to trial he had just before accepted—by responding to its last question: "I am confused about that"—the judge both added to and distorted the evidence as well as assumed the role of a witness by telling the jury: "It was a word [truthful] he didn't understand". The court of appeals excused what in its own decision it had described as error by holding that there was no violation of the first and second *Quercia* proscriptions and, instead, considered error during trial as if involving only the third.

It would appear that the court of appeals believed that the trial judge's "comments" in "addressing witness credibility" had not been "one-sided" because his testimony regarding what witnesses "usually" do could be said to have been applicable to all those whose testimony the jury considered. They were not, however, impartial—it was petitioner which made accusation of perjury, as the trial judge remarked; and plaintiff who claimed in summation that he ". . . can't say" petitioner's fact witnesses "didn't believe the things they told you" because it had been necessary for them to "reconstruct" their testimony based upon "documents with numerous errors, dates, events, absent records" (A.1349). Since what the judge said was not merely invidious it *answered* petitioner's summation claim that plaintiff's alleged shipboard knee injury never occurred, the district court surely did not "strive for

'that atmosphere of perfect impartiality which is so much to be desired in a judicial proceeding' ". *Santa Maria v. Metro-North Commuter R.R.*, 81 F.3d 265, 273 (2nd Cir. 1996), quoting *Glasser v. United States*, 315 U.S. 60, 82 (1942). Just as surely, the trial judge improperly ". . . convey[ed] the court's view about the merits of a party's claim" because his one-sided questions established that plaintiff's affidavit was only mistaken and, hence, that it did not impeach his trial testimony which therefore had to be true. *Berkovich v. Hicks*, 922 F.2d 1018, 1025 (2nd Cir. 1991). The trial judge also "impos[ed] his own opinions on the jury" and to affirm the court of appeals also had to contradict its holding in *Care Travel Co., Ltd. v. Pan Am World Airways, Inc.*, 944 F.2d 983, 992 (2nd Cir. 1991). Moreover, in *Rivas v. Brattesani and Romano*, Second Circuit No. 1745, September 4, 1996, a denial of a new trial was reversed for comments out of the hearing of the jury and questioning of witnesses far less extreme and intrusive than those of the trial judge in this case, by holding, based upon *Montgomery Ward & Co. v. Duncan*, *supra*, that ". . . of course the rule [is] that a motion for a new trial must be granted if the trial was not fair to the moving party". In *Starr v. United States*, 153 U.S. 614, 626 (1894) and *Hickory v. United States*, 160 U.S. 408, 421-23 (1896), this Court held that the "lightest word or intimation" given by a trial judge to the jury "may prove controlling", decisions which the court of appeals ignored although what was "intimated" was not less than that petitioner's claim of perjury—including perjury occurring prior to trial which plaintiff falsely admitted—should not be believed. The remark out of the jury's hearing that claiming perjury would have the result of "enhancing the damages that you are going to pay" demonstrates harm from error in the opinion of the person with " 'feel' for the overall case" (*Neely v. Eby Const. Co.*, 386 U.S. 317, 325 (1967)) on the basis of cause (telling the jury that they should not believe plaintiff had lied and resulting nullification of the immediately ensuing "*falsus in uno, falsus in omnium*" charge (A.1432)) and effect (the verdict for

$672,000 damages for pain and suffering although plaintiff's doctor's records showed he was pain free after knee replacement surgery, which in any event would have occurred later, on November 15, 1993, only 41 days after it was performed (A.1626)). Holding the judge's "comments" not prejudicial despite his prediction which he later assured would prove accurate contradicted *San Antonio v. Timko*, 368 F.2d 983 (2nd Cir. 1966), a case in which it was said that an error which can be excused when a case is clear requires reversal when it is close. In *United States v. Filani*, *supra*, 74 F.3d at 386, it was held that a "searching examination of the entire trial transcript" is required before it can be said that a judge's biased questions did not have harmful impact; and in this case the judge repeatedly expressed prejudice against petitioner's defense of plaintiff's perjury both in and out of the jury's hearing. And as this case shows, a holding that parties are "entitled only to a fair trial, not a perfect trial" is as meaningless as the claim that a district court in the Second Circuit has discretion to grant a new trial on evidentiary grounds in any case where weight and credibility are inseparable—what was found only "less than desirable" was the trial judge's "comments" telling the jury to ignore petitioner's argument why plaintiff's claim of injury January 17, 1991 might represent fraud upon the court.

REASONS FOR GRANTING CERTIORARI

Excusing error during the trial represents a clearest instance where a United States Court of Appeals "so far departed from the accepted and usual course of judicial procedure, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power". Supreme Ct. Rule 10(a). The wilfulness of its far departure is shown by the Second Circuit's recognition of *United States v. Filani*, *supra*, and its refusal to follow its own reading of this Court's binding precedent. Its extent is demonstrated by the fact that it

affirmed in an unpublished opinion which—had the trial judge's "comments" been described—would have been obvious error. For reason of concern for the reputation of the courts, whether a judge can tell a jury what witnesses "usually" do or that they don't "understand" what "truthful" means is "an important federal question" which was decided "in a way which conflicts with relevant decisions of this Court". Rule 10(c). Even an absurdly unfair trial is, however, less important than the recently adopted "law" of the courts of appeals.

Liability claims are often proven only through testimony and in most cases weight of evidence cannot be evaluated without considering witness truthfulness; and when some level of self-impeachment is reached, because no witness is competent to testify unless he or she knows what "truthful" means, evidence essential to the verdict must be found to be false. No less than judicial "comments" concerning what witnesses "usually" do, decisions denying the right of a trial judge to reject a jury verdict by disagreeing with its evaluation of witness credibility decrease confidence in the jury trial system; and judicial response no matter how earnestly believed, asserting, as did the district court, or assuming, as the court of appeals may, that "lying . . . usually that doesn't happen" will not alter that fact. There is no doubt that there is conflict between circuits concerning a trial judge's right to find with reason that evidence supporting the verdict is perjury, not worthy of belief or implausible and thereafter weigh only whatever evidence remains. Rule 10(a). See, *Swentek v. USAIR, Inc., supra,* (judge may grant new trial based upon his or her own belief of witness credibility); *White v. Pence, supra* (case remanded for reconsideration with instruction that the district court can reject testimony the jury believed), holdings which cannot be reconciled with *Sorlucco v. New York City Police Department, supra,* (no disagreement with jury credibility assessment permitted) or *Latino v. Kaizer, supra* (disagreement allowed only when evidence supporting the

verdict is physically impossible). Before this Court's very recent decision in *Gasparini, supra*, it would not seem that it had said more than that whether to grant or deny a new trial motion addressed to the evidence was "confided almost entirely to the exercise of discretion on the part of the trial court" (*Allied Chemical Corp. v. Daiflon, Inc., supra*, 449 U.S. 33, 36 (1980)); and this holding—which *is* sufficient if all a trial judge should ever do is consider the facts and consult his or her conscience—alone establishes that the Second Circuit rule forbidding re-examination of a jury's credibility findings is error. There is no doubt that it is a new trial *grant* which bar to review is designed to shelter because it is this determination, and not a denial, which protects the reputation of the jury trial system—the power to order a case retried has the effect of verifying not only decisions refusing to but all those verdicts which are not as a result rejected. Nonetheless, so far has zeal proceeded to avoid retrials in personal rights or injury cases—those that are not "complex" but are "highly disputed" in part because even badly impeached or inherently implausible testimony can establish that there "*is* no great weight of evidence in any direction"—that the federal courts appear to be abandoning defense of the truth where it is most needed; and the district court went so far in this case as to insist that a party should too. In fact, to conclude that the Second Circuit's view of abuse of discretion is reconcilable with Rule 59(a) F.R.Civ.P. because it leaves a district court judge the same "large" discretion English common law trial courts had (see, *Aetna Cas. & Surety Co. v. Yeatts, supra*) requires as much an act of imagination as the trial judge's belief in what witnesses "usually" do.

The view of the courts of appeals that they have power to review not only "conflicts with relevant decisions of this Court" the reason it does demonstrates why this Court's intervention is required. To treat a reviewable mistake of law concerning the *extent* of a trial judge's discretion or authority as opportunity to reconsider the *soundness* in particular cases of

an exercise "confined almost entirely to the . . . discretion of the trial judge" is not error it is paradox which can be remedied only by a decision of this Court setting out what that discretion is and whether it includes the right to reject testimony or other evidence believed reasonably to be perjury, unworthy of belief or implausible, issues concerning which the courts of appeals are in any event hopelessly in conflict. They have on their own created a right to review and many use that power to bar exercise of the trial judge's discretion or to curtail it; and as a result not "a" but every "United States Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court". Sup. Ct. Rule 10(c).

CONCLUSION

The writ should be granted.

Respectfully submitted,

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